the court could accept as a reasonable excuse for not filing and serving the memorandum within the prescribed period. The remaining grounds submitted by counsel for the appellant afforded no reasonable excuse for the delay. With regard to the submission that counsel had to read and re-read a voluminous appeal record in order to prepare the memorandum of appeal I need only state that the record including the exhibits was certainly not that voluminous as to require more than a few days to appraise oneself of the issues involved and it should not have taken very long for the appellant's solicitors to prepare a memorandum of appeal. If the appellant's solicitors were in real difficulty about preparing the memorandum they should have manifested it by applying for an extension of time promptly upon receiving the appeal record on May 26, 1973. A memorandum of appeal is normally set out in a concise form and there is provision for its amendment on terms after it has been filed to correct any error or omission. The memorandum of appeal which the appellant's solicitors eventually filed in court contained nine short paragraphs spread over three typewritten sheets of paper of which almost a page consisted of the heading and other formal parts of the appeal."

He concluded that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal.

If he had taken the view that the mistake of the appellant's solicitors in the circumstances of this case was not such a ground, his view would, with respect, be unexceptionable but as a general dictum, it went, to my mind, too far.

Then the learned judge went on to give the authority of the decided cases on which he had relied to justify his conclusion. They were two: *Chong Kuong Ying & Ors.* v. *Louis Lavagna*[5] and *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed*.[4]

These are decisions of the Federal Court which are, if in point, binding on him. It was at this stage that the learned judge, with respect, misdirected himself. They were not in point. In the first place, both cases were cases where the appellant had to apply for extension of time to file a notice of appeal. Without a notice of appeal, no appeal was in existence. Here a notice of appeal had been filed. There was an appeal, but there was no record for it to be heard, unless time was extended for its filing. In the second place, these two cases were appeals from the High Court to the Federal Court. The rule applicable was Order 58 rule 15 of the Rules of the Supreme Court which provided —

"(1) No appeal shall, except by special leave of the full Court of Appeal, be brought after the expiration of one month. . . ."

It must be immediately obvious that the requirement of the special leave of the full Court of Appeal lays on any applicant a heavier burden than the ordinary leave of a lower court to win over the exercise of judicial discretion in his favour and that to cite or to rely on cases on the discharge of the burden for special leave in deciding whether ordinary leave should not be granted is to apply the wrong principle.

Our Order 58 rule 15, R.S.C., continues to apply the rigidity of the pre-1909 English rule. Pre-1909 English cases continue to be of assistance in our reading of Order 58 rule 15, R.S.C., but they are no longer applicable in England itself where the procedure has been relaxed and a dilatory litigant now has only to seek the leave of the court below or the Court of Appeal: see 1962 *Annual Practice* Order 58 rule 13 and rule 14. I need only to reproduce the following note at page 1697:

"Application for extension of time for appealing:

. . . It is entirely in the discretion of the court to grant or refuse an extension of time. It may for example, be granted where the omission to appeal in due time was due to a mistake on the part of a legal adviser (*Gatti* v. *Shoosmith* [1939] 3 All E.R. 916 C.A.). The fact that the Court of Appeal has, in a subsequent case, taken a different view of the law from that of the court below is not of itself a sufficient ground for an extension of time for appealing, but the circumstances as a whole may justify it (*Craig* v. *Phillips* (1877-8) 7 Ch. D. 249 C.A.). The length of time that has elapsed is always a material factor in the grant or refusal of leave to appeal out of time."

to show how much more lenient the court is where special leave is not involved.

Since the learned trial judge had, with regret, proceeded on a wrong principle, it behoves us, sitting on appeal, to examine whether the facts merit the exercise of judicial discretion in favour of the appellant. On the facts as disclosed, it does not appear possible to challenge Mr. Atma Singh's contention that he had read the 14 day period in rule 2(5) of Order XXXIX Subordinate Court Rules to run from the date of service of the appeal record on him and not from the service of the notice that the appeal record was ready but he was advised well within time by a letter dated May 28, 1973 from the solicitors for the respondents of the requirement in Order 59 rules 2(1) and (2) of the Rules of the Supreme Court and he could not really contend that he remained in ignorance of this rule. He would or should have been disabused of his earlier mistake by this later advice.

I feel fairly confident that if the learned trial judge had applied the right principle to the facts, he would have come to the same conclusion and refused leave.

I would dismiss this appeal with costs. Deposit to the respondents against taxed costs.

Suffian L.P. and **Ong Hock Sim F.J.** concurred.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Gill; Allen, Gledhill & Ball.*

RE KONG MUN CHEONG & ANOR.; MALAYA INDUSTRIAL AND MINING CORPN. BHD. v. OFFICIAL ASSIGNEE, MALAYSIA

[F.C. (Suffian L.P., Ong Hock Sim F.J. and Chang Min Tat J.) April 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 157 of 1974]

Bankruptcy — Offer of composition with creditors — Deed of assignment not registered — Act of bankruptcy — Subsequent garnishment with notice of available act of bankruptcy — Ineffective as against Official Assignee — Bankruptcy Act, 1967, s. 3(1)(h).

In this case the bankrupts had called a meeting of their creditors and made an offer of 70% by way of composition to their creditors. This offer was later embodied in a circular addressed by their accountants to the creditors. Subsequently the appellant, who was one of the creditors, obtained a sum of $67,319.95 under a garnishment order in satisfaction of a judgment debt from the bankrupts to the appellants. The Official Assignee applied for payment over of this sum. The High Court ([1975] 1 M.L.J. 224) gave judgment in favour of the Official Assignee and the appellant appealed.

Held, dismissing the appeal: as the offer was made to creditors and was not followed by the registration of a deed of assignment, the offer became an act of bankruptcy and therefore in this case as the appellant had notice of the act of bankruptcy, the Official Assignee was entitled to payment of the sum received.

FEDERAL COURT.

V. T. Nathan for the appellant.

Fong Seng Yee, Official Assignee (*Vincent Das*, Senior Assistant Official Assignee, with him) for the respondent.

Chang Min Tat J.: This appeal calls for the determination of the question whether on February 18, 1971 the appellant had notice of any available act of bankruptcy committed by the bankrupts. On that day a sum of $67,319.95 was paid over by the court on garnishment issued by the appellant in satisfaction of part of the judgment debt due from the bankrupts to the appellant. By such a receipt the attachment of the debt would have been for the purposes of the Bankruptcy Act, No. 55 of 1967, completed as provided in section 50(2) of the Act and the appellant would have been entitled to retain the money as against the Official Assignee unless under section 50(1) it had prior notice of the commission of an available act of bankruptcy by the debtors. It maintained that what it had notice of was not an act of bankruptcy. The Official Assignee maintained otherwise and brought an application in the High Court by way of motion for payment over of this sum. The learned judge found for the Official Assignee and it is from his judgment that the appellant now appeals to this court.

The facts relevant to this case are briefly that the bankrupts called for a meeting of their creditors and at this meeting, convened on December 29, 1970, an offer of 70% by way of composition of their debts was made by the debtors to their creditors. This offer was subsequently embodied in a circular addressed by their accountants to the creditors. There the matter rested and no further action by the debtors or the creditors was taken until March 29, 1971 when the petition was presented against the debtors.

This question therefore deals basically with the construction of section 3(1) of the Bankruptcy Act and in particular sub-sub-section (h):

"S.3(1) A debtor commits an act of bankruptcy in each of the following cases:

....

(h) if he makes to any two or more of his creditors, not being partners, an offer of composition with his creditors or a proposal for a scheme of arrangement of his affairs, and such offer or proposal is not followed by the registration within 14 days thereafter of a deed of arrangement with his creditors, in accordance with the rules for the time being in force for the registration of deeds of arrangement under this Act."

Learned counsel for the appellant first submitted that the bankrupts were solvent on the day the meeting was convened but though solvent they were not in a position immediately to pay all their creditors at one go or to meet their debts unless an orderly scheme for deferred repayments was arrived at. This with respect had nothing to do with the offer of a compromise. The question was whether an offer of composition was made. As to this, there could be no denial in this case.

Learned counsel for the appellant then argued that the deed of arrangement referred to in sub-sub-section 3(1)(h) must necessarily be a concluded arrangement in proper form duly executed and capable of registration. In the events that happened no agreement was arrived at. The point with respect was however not failure to comply with the form of the deed, but the effect of the failure to register within the time specified a deed of arrangement with the creditors of the debtors.

As to this learned counsel for the appellant had with respect nothing much to say.

For his own part the learned judge held:

"Our bankruptcy law does not create an act of bankruptcy simply because a debtor makes an offer but where the offer is under an instrument which constitutes a deed of arrangement as defined under this Act, the failure to register such deed in accordance with the law either by the debtor or one of the creditors would constitute a breach of the law. The debtor will in such a case be held to have committed an act of bankruptcy and in that event the validity of the offer of a composition is not recognised by law."

It was said to be unfortunate that there was no case law on the construction of section 3(1)(h) but this is understandable since this sub-sub-section is to be found only in our Bankruptcy Act. However a matter of construction is really not dependent on case law unless of course a particular case has decided the point in issue but calls for the application of the ordinary canons of construction. The first rule of construction is of course to ascertain and apply the plain meaning of the words of the section and with respect in my view the language of sub-sub-section 3(1)(h) is sufficiently clear as not to admit of any doubt or other construction. In the words of the Official Assignee who himself appeared the offer of composition made by the debtors is an act of bankruptcy which however becomes "un-made" by the registration within the time specified of an instrument which satisfied the definition of a deed of arrangement in the Act. With respect I agree that on a proper and reasonable construction of sub-sub-section 3(1)(h) where an offer is made and it is followed by the registration of a deed of arrangement, no act of bankruptcy is committed. Conversely an offer becomes an act of bankruptcy if it is not followed by registration of a deed of arrangement.

Since nothing was registered in the events of this case nothing turns on the interpretation of "a deed of arrangement" and it is also clear that an act of bankruptcy had been committed.

For these reasons I would decline the invitation of learned counsel for the appellant to consider whether there was a deed of arrangement, whether what was transmitted to the creditors was a deed of arrangement within the meaning of the Act and what were the requirements for the registration, as being pointless and only of academic interest, if at all.

It was the contention of the Official Assignee that the act of bankruptcy was committed on December 29, 1970 when the offer of 70% was made at the meeting of the creditors. I see the force of this argument but it seems to me that having regard to the use of the words "and ... is not followed" for the more direct "unless ... followed," it is to my mind arguable. I would therefore defer expressing an opinion to a

more suitable occasion especially as, whether an act of bankruptcy was committed when the offer was made on December 29 or only when the period of 14 days expired *i.e.* on January 12 the following year, the appellant (who was present at the meeting and was circularised with the offer) must clearly be taken to have had notice of the commission of this act of bankruptcy by the debtors so as to bring the monies obtained by garnishment within the net of section 50 of the Bankruptcy Act.

The Official Assignee had a further contention that there was an earlier act of bankruptcy and that was when the appellant itself levied execution by garnishment proceedings on October 6, 1970. The learned judge however did not deal with this point though submissions were made and I consider it better to defer consideration of this point to another occasion.

I would dismiss the appeal with costs. Deposit to the respondent against taxed costs.

Suffian L.P. and **Ong Hock Sim F.J.** concurred.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

KRISHNAN v. HOR KOH MOI

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Raja Azlan Shah F.J.) April 5, 1975]

[Ipoh — Federal Court Civil Appeal No. 143 of 1973]

Landlord and Tenant — Claim for possession of premises — Whether premises within limits of local authorities — "Local authority" — Meaning of — Whether premises controlled premises — Onus of proof — Control of Rent Act, 1966, ss. 1(2), 4(1) and 4(2).

The appellant had claimed possession of premises occupied by the respondents. The question was whether the premises were controlled premises under the Control of Rent Act, 1966. The learned judge held that the premises were controlled premises. The appellant appealed.

Held: (1) as the premises were within and under the jurisdiction of a local council and were built before 1948, they were controlled premises within the meaning of the Control of Rent Act, 1966;

(2) the onus of proof was on the appellant as landlord to show that the premises were not protected under the Act.

Case referred to:-

(1) *Ying Chiang* v. *Bong Tjhin Oi* [1973] 2 M.L.J. 136.

FEDERAL COURT.

S. Jeya Palan for the appellant.

Lim Seong Chon for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned judge dismissing an appeal from the Magistrate's Court, Sitiawan.

Appellant sued respondent to recover possession of a piece of land known as premises No. 102, T. K. Liew Road, Sitiawan. The land was under the jurisdiction of Kampong Koh Local Council. From 1939 to 1955 Ling Kee Long was the registered owner of the land. In 1955 he transferred it to his son, Ling Sheong Aik. In 1962 Ling Kong Kwang became the owner. He transferred it to Teoh Ah Geok in 1969. It was not until November 26, 1971 that the appellant became the owner. There was a house on the land which was occupied by respondent since 1947. By an agreement dated February 10, 1951 Ling Kee Long sold the house for $600 to respondent who agreed to pay a ground rent of $1.50 per month. One of the terms of the agreement was that as long as respondent carried on paying the ground rent the owner would have no right to demand for the demolition of the house. On March 1, 1972 appellant served respondent with the usual one month's notice to quit.

One of the grounds upon which respondent resisted the claim for possession was that the premises were protected by the Control of Rent Act, 1966. Appellant contended that the burden was on respondent to prove that the building in question was controlled premises. To do so respondent would have to show that the building was within the area of the Local Authority and that the building was completed before January 31, 1948.

In his evidence respondent stated that he resided in the house since 1947 and bought the house from Ling Kee Long in 1951. Ngok Toh Heng (DW3) was the son-in-law of Ling Kee Long. He testified that the house was built before the Japanese occupation. He collected rent on behalf of Ling Kee Long. He corroborated substantially the evidence of respondent. Wong Boon Huai (DW4), respondent's neighbour confirmed that the house was built before the Japanese occupation. It is quite clear that respondent had established that the building was completed long before 1948. The magistrate found as a fact that the building was completed before 1948. That was accepted by the learned judge.

Appellant conceded that the said building was within the area of the Local Council of Kampong Koh. However, he maintained that only those areas covered by a local council established under the Local Council Ordinance, 1952 which had previous to that formed part of an area covered by a Municipality, Town Council, Town Board or Rural Board are covered by the provisions of the Control of Rent Act, 1966. I do not think that such a proposition can be supported. Section 1(2) of the 1966 Act applies to all areas which are within the limits of the Local Authorities. In order to determine whether an area within a local council falls within the definition of a Local Authority, it is necessary to see what are the areas contemplated by the 1966 Act. "Local Authority" is defined by section 2(1) of the 1966 Act to mean: —

"... a Municipality, Town Council, Town Board or Rural Board, and in respect of any part of its area which immediately before the coming into force of the Local Councils Ordinance, 1952 was included in the area of a Municipality, Town Council, Town Board or Rural Board, a Local Council established under that Ordinance and any reference to 'the local authority' shall be construed as a reference to the local authority in whose area the premises in question are situated;".

An area is within the meaning of the definition of "Local Authority" if it falls within: —

(a) A Municipality, Town Council, Town Board or Rural Board; or

(b) Any part of an area which was included in a Municipality, Town Council, Town Board or Rural Board before the operation of the Local Council Ordinance, 1952; or

(c) A Local Council established under the Local Council Ordinance, 1952.